

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

Alan E. Dunford,

Case No. 3:11CV2028

Petitioner

v.

**ORDER**

Terry Tibbals, Warden,

Respondent

This is a habeas corpus case under 28 U.S.C. § 2254 in which, on reference, the Magistrate Judge has filed an Report and Recommendation recommending that the petition be denied. (Doc. 15).

The petitioner has not filed an opposition to the Report and Recommendation. Instead, he accepts its conclusion that the petition is premature due to the availability of any unexhausted remedy – namely, a delayed appeal pursuant to Oh. S.Ct. Prac. R. 701(A)(4). Other judges of this court has likewise concluded that a petitioner must, where appropriate, exhaust this remedy before seeking habeas relief in this court. (*See* Doc. 15, at 16-21 (citing cases)).

Acquiescing in that conclusion, the petitioner's response to the Report and Recommendation is to request that I either hold further adjudication of his petition in abeyance pending exhaustion of the remaining state remedy or, alternatively dismiss the petition without prejudice to his being able to refile (Doc. 20, at 3)

The Magistrate Judge recommended “granting prospective equitable tolling” under *Holland v. Florida*, 560 U.S. 631 (2010). (Doc. 15, at 19-20). I agree that dismissal without prejudice is the more appropriate course, rather than holding the petition and its adjudication in abeyance.

The Magistrate Judge would dismiss without prejudice if the petitioner returned to this Court within thirty days after the Ohio Supreme Court, if such occurred, denied relief.

I prefer to give the petitioner sixty days after such action by that Court to respond to the respondent’s arguments on the merits, as found at pages 19-26 in the respondents’ Return of Writ (Doc. 7). If the petitioner does so, the respondent shall have leave to file a reply thereto within fourteen days thereafter

If the petitioner fails to meet the deadline set herein, dismissal of his petition shall be with prejudice.

It is, accordingly, hereby

ORDERED THAT:

1. The Report and Recommendation of the Hon. Kathleen B. Burke (Doc. 15) be, and the same hereby is, on *de novo* review, adopted as provided herein; and
2. The petition be, and the same hereby is dismissed, without prejudice if the petitioner:
  - a) pursues his state court remedy within thirty days of the entry of this Order, and b)
  - if the Ohio Supreme Court denies relief, within sixty days thereafter file his response to the respondent’s arguments on the merits of his petition, as found on pages 19-26 of the Return of Writ (Doc. 7).

So ordered.

/s/ James G. Carr  
Sr. U.S. District Judge